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In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 675

PORT OF SEATTLE, a municipal corporation, *Petitioner,*

vs.

GLENN A. MARTIN, *et al., Respondents.*

PORT OF SEATTLE, a municipal corporation, *Petitioner,*

vs.

VERN AARHUS, *et al., Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD H. RIDDELL
Counsel for Respondents

PAUL R. CRESSMAN

STEPHEN E. DEFOREST

WILLIAM L. HINTZE
Of Counsel

1520 1411 Fourth Avenue Building
Seattle, Washington 98101

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RESPONDENTS' BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Is recovery of just compensation by a property owner from an airport owner and operator for a constitutional taking arising out of low flights of jet aircraft which have substantially impaired the use and enjoyment of claimant's property and substantially reduced its value, precluded by the Federal Aviation Act of 1958 creating a public right of freedom of transit through the navigable air space?

2. Does recovery against an airport owner by a landowner whose property has been taken or damaged in the constitutional sense create an unreasonable burden on interstate and foreign commerce?

STATEMENT OF CASE

This is an "inverse condemnation" action brought by 196 property owners against the Port of Seattle, a municipal corporation, as owner and operator of the Seattle-Tacoma International Airport. The respondents seek damages under Art. I, Sec. 16, Amendment 9 of the Washington Constitution[1] and Amendment XIV of the United States Constitution, for a taking or damaging of their property for public use resulting from low flights of jet aircraft in landing and taking off from the airport. Respondents' homes lie within a rectangular area, referred to by both respondents and petitioner, as the "litigated area."[2]

Commercial jet flights at Seattle-Tacoma Airport have steadily increased since October, 1959. By August, 1962 there were 1302 jet landings per month (Tr. 0029). Substantially more than one-half of all jet landings are made from the south over respondents' properties (Tr. 0030). In landing from the south, jet aircraft regularly pass over the litigated area at altitudes under 500 feet (Tr. 0033; Ex. 61-63, St. 138-143). The flight pattern varies both in altitude and laterally.[3]

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[1] ". . . No private property shall be taken or damaged for public or private use without just compensation having been first made. . . ."

[2] The "litigated area" is located directly south of the primary north-south runway of the Seattle-Tacoma Airport in a rectangular area which is 5,318 feet long and 2,500 feet wide. The northern boundary of the litigated area is contiguous to the southern boundary of the airport. The center line of the runway, if extended beyond the airport property, would bisect the litigated area (Ex. 30, St. 91). For a visual representation of this area see the drawing in the appendix hereto.

[3] No two aircraft fly in the same air space in making a landing. Wind, turbulence, and other atmospheric conditions, together with pilot judgment and skill, are obvious factors that cause variances, both in altitude (St. 405,406, 432, 506, 528, 554, 654, 690, 700; Ex. 61-63, St. 138-143)

In December, 1961 a 1700-foot extension to this runway at its southern end (toward the litigated area) was opened for use. Since that time the extension has been frequently used, thereby bringing the approaching jets substantially lower over respondents' properties (Tr. 0037-38).[4]

The noise from jet aircraft landing is a high-pitched sound which a normal human being finds much more annoying than lower-pitched sounds of even the same sound pressure level (Tr. 0035).

The trial court found that when jets pass over respondents' properties:

> "... all conversation has to cease, radio and television reception is disrupted, the windows in the house vibrate, pictures and objects on shelves rattle and become displaced, and sleep is frequently disrupted. The noise is so great it is painful to the ears of some of the residents, especially children. Among some of the plaintiffs, the increased noise from jet aircraft has caused anxiety and fear for their safety." (Tr. 0035)[5]

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and laterally (St. 380-382, 430-432, 441, 453-454, 471, 484, 486, 505, 518, 528, 654, 672-673, 690, 699), in the landing pattern of aircraft, whether the approach is a visual or an instrument one. A conceptual composite path of all jet aircraft landing describes an elliptical cone lying on its side with the point of the cone near the end of the runway, and flaring upward and outward to the south over respondents' properties (See Ex. 19, St. 179-182, illustrating this cone with reference to the Instrument Landing System).

[4] Petitioner states that this extension had not been opened for regular use (Petition, p. 4). The findings are to the contrary. Only those aircraft landing under Instrument Flight Rules were unable to use the extension and upon relocation of the instrument system they too would be approaching approximately 109 feet lower over the litigated area (Tr. 0037-38).

[5] Represented by petitioner as "Mere Noise" (Petition, p. 16).

The continuous operation of jet aircraft at the Seattle-Tacoma Airport has substantially damaged the respondents' properties (Tr. 0037). Real estate brokers cannot get potential buyers even to look at the homes (St. 678, 804-805). Some realtors decline to accept listings in the area (St. 658, 677). Because of the impact of jet flights the Federal Housing Administration, in August, 1960, declared the area within which respondents' properties are located a "ban area" in which it would not insure mortgage loans (Tr. 0036).

The Federal Aviation Agency made a study "to provide technical guidance . . . in a program to discourage residential development . . . in areas contiguous to public airports and consequently subject to high aircraft noise levels, particularly under the approach and departure paths of dominant runways . . .", and its report, released in 1961, recommended the exclusion of new residential construction in an area encompassing, but nearly twice as large as, the area of respondents' properties (Ex. 69, pp. 1 and 12; St. 216-217). Respondents' expert real estate appraiser testified that the fair market value of all the respondents' properties had been substantially reduced as a result of jet aircraft operation (St. 727-729, 804-809, 815, 835-836). On the other hand, petitioner introduced no expert appraisal testimony whatsoever as to the effect of low jet flights upon property values.[6] Petitioner's trial counsel

[6] Petitioner infers that respondents' appraiser was not qualified as an expert and rendered his opinion without study (Petition, p. 8). In fact, Mr. Keppler is an eminently qualified real estate appraiser (St. 707-710) who in another instance had been employed *by petitioner* to appraise properties adjacent to its airport (St. 709) and who rendered his opinion in this case based upon an extensive study, having spent part or all of 60 to 70 days (St. 711) interviewing residents (St. 727),

frankly admitted in his final summation to the trial court: "You [judge] and I wouldn't go out there and live" (Supp. St. 13).

The trial of this action was limited, by stipulation of all counsel, to the question of liability and the measure of damages (Tr. 88-90). After respondents prevailed in the trial court, petitioner appealed to the Washington Supreme Court which affirmed in a unanimous *en banc* decision. Petitioner's charge that the Washington Supreme Court "ignored" the federal questions tendered to it (Petition, p. 10) is contradicted by its own recitation of the steps taken in the state courts to present and preserve the federal questions.[7]

ARGUMENT

The complaints in this consolidated cause were filed on December 7, 1960 and April 14, 1960, but the trial was delayed pending this Court's decision in *Griggs v. County of Allegheny*, 369 U.S. 84 (1962). The Port of Seattle filed an *amicus curiae* brief in the *Griggs* case.

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talking with realtors, land developors and builders (St. 721-726), observing the area (St. 727) and studying sales within, and comparable sales outside, the area (St. 727). The study he had "not gone into" related to the individual monetary damge on each parcel of property, an issue not being tried (Tr. 0089).

[7] Petitioner states, at page 11: "The federal questions were preserved and presented to the Washington Supreme Court through petitioner's Assignments of Error Nos. 2 (Tr. 0231, p. 45; Tr. 0072-75) and 7 (a)-(f) (Tr. 0231, pp. 53-55), and through subsequent written and oral argument to the court. Petitioner again tendered those questions in a petition for rehearing (Tr. 0233, pp. 6-17). The court ordered respondents to answer the petition for rehearing (Tr. 0234). Respondents accordingly responded with arguments *directed to each of the federal questions in the petition for rehearing, including the federal questions here presented* (Tr. 0235, pp. 3-12). The Washington Supreme Court subsequently denied the petition for rehearing . . . " (Italics added).

In its "Statement of Interest" the Port of Seattle there urged:

> "The interest of your amicus curiae is identical with that of respondent in respect to claims of subjacent property owners, who positioned as petitioners, seek damages against the Port of Seattle for a 'taking' of air space above their property by aircraft flying at low altitudes in taking-off and landing at the airport."

Petitioner there challenged *United States v. Causby,* 328 U.S. 256 (1946), which had been followed by the Washington Supreme Court in *Ackerman v. Port of Seattle,* 55 Wn.(2d) 400, 348 P.(2d) 664 (1960), alleging that if "*Causby* is followed by the United States Supreme Court in the present case, there would follow an unprecedented wave of litigation with an insurmountable financial burden placed upon airports contrary to the public interest and welfare." It contended that there could be no "taking" in a constitutional sense by a public airport of air space above a landowner's property (Br., p. 2).

In *Griggs* this Court rejected petitioner's arguments and reaffirmed *Causby.* It held that flights in the public domain, as defined in the Federal Aviation Act of 1958, 49 U.S.C. 1304 (Supp. 1962), do not preclude liability where there has been a constitutional taking by an airport operator of the subjacent landowner's property.

I. State Court Findings of Fact Are Not Reviewable

The Washington courts held in the instant case that there had been a constitutional taking of respondents' property by the Port of Seattle. Despite a different approach in the courts below, petitioner now accepts the

"full implications" of the *Griggs* decision (Petition, p. 16). It therefore concedes, as it must, that the enactment of the Federal Aviation Act of 1958 did not, and does not, totally preclude noise damage claims by landowners. Yet petitioner's first question is whether Congress intended to exclude respondents' noise damage claims. In order even to reach this question, petitioner must first distinguish the claims made here and those which were allowed in *Causby* and *Griggs*, and only then can it proceed to the question of whether there is a conflict between Congressional intent as expressed in the 1958 Act and the allowance of respondents' claims. Petitioner's attempt to make such a distinction is an invitation to this Court to review the state courts' findings of fact.

To be more specific, petitioner asks whether, in the Federal Aviation Act of 1958, Congress intended to preclude noise damage claims arising out of flights over 500 feet. The record is uncontradicted that all of the properties involved in this action were and are subject to regular and frequent flights below 500 feet (Tr. 0033), and that the air space above an imaginary plane at heights of from 199.95 to 362.72 feet over respondents' properties is "reasonably necessary for the safe and efficient operation and maintenance" of petitioner's airport (Tr. 0038). These findings are supported by the evidence. Respondents produced expert evidence of aircraft altitudes based upon actual physical measurements showing landings of jet aircraft as low as 236 feet at South 200th Street and 463 feet at South 216th Street (Exs. 61-63, St. 138-143). There was no evidence by petitioner as to actual measurements. The Washing-

ton Supreme Court by way of dictum suggests the possibility of liability for flights over 500 feet. Respondents agree that there is nothing magical about 500 feet insofar as the constitutional rights of property owners are concerned, but the facts of this case do not reach that question.

Secondly, petitioner asks whether Congress intended to preclude noise damage claims arising from flights not directly over the claimant's property. It fails to make clear that this contention refers only to those 56 respondents in the *Aarhus* case, whose properties are within the "approach area"[8] but adjacent to and outside the "localizer beam."[9] The interference with the use of these respondents' land is of the same directness and magnitude as the other respondents; the only distinguishing factor is that the aircraft do not regularly pass directly over these properties. The Washington courts held that the absence of a technical trespass did not preclude these 56 respondents from recovering within the meaning of Art. I, Sec. 16, Amendment 9 of the Washington Constitution which provides for just compensation of not only a "taking," but also a "damaging" of private property for public use.

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[8]The "approach area" is the surface area lying directly below the "approach surface," which is an imaginary plane extending upward and outward from a point 200 feet south of the south end of the runway at a slope of 50 to 1. Objects projecting above this imaginary surface are deemed obstructions to air navigation and must be removed in order to insure safety in take-off and landing of aircraft (Ex. 8, St. 39-40). This area is established by the Federal Aviation Agency.

[9]The "localizer beam" is a radio beam to give horizontal information to an aircraft on an instrument approach (Ex. 30, St. 92). The properties of 140 respondents lie below this localizer beam; the properties of the remaining 56 respondents lie adjacent to but outside the localizer beam but within the approach area (Tr. 0033). (See Appendix.)

The construction and application of a state constitution by the highest court of that state is conclusive. *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937); *Manley v. Park*, 187 U.S. 547 (1903). Moreover this Court has long recognized the applicability and validity of the "damaging" provision of a state constitution. *Chicago v. Taylor*, 125 U.S. 161 (1888).

Petitioner contends that this construction imposes an unreasonable interference with commerce (Petition, p. 16). The only possible effect, however, is the necessity of paying just compensation which arises *only* when and if the airport fails to acquire adequate property interests for its approachways. This is at most an incidental, nondiscriminatory, nonrecurring economic effect upon commerce which in no way obstructs movement, or federal regulation, of air traffic. This Court has held that the states may levy general taxes upon the property of those engaged in interstate commerce even though in such cases the economic impact is obviously direct, inevitable and recurring. *St. Louis & S.W. R. Co. v. Nattin*, 277 U.S. 157 (1928); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194 (1897).

Petitioner's third attempt to rewrite or gloss over the facts in order to secure review is premised upon the proposition that liability has been found "regardless of whether the flights effectively destroy the normal usefulness of the property . . ., substantially impair the use and value of the property, or merely depreciate the value by any demonstrable amount" (Petition, p. 2). Here, too, petitioner fails to tie in its contention with the facts of this case as established by the state courts. The Washington courts held that the flights "substan-

tially interfered" with the plaintiffs' [respondents'] use and enjoyment of such properties and have caused substantial diminution in the value of said properties" (Tr. 0035). Actual abandonment of the property is not a prerequisite to a constitutional taking, as this Court specifically held in *United States v. Causby,* 328 U.S. 256 (1946), in which the low flights, while disruptive of the landowner's chicken business, did not force the respondents to move out. The evidence there was that respondents were frequently deprived of their sleep and the family had been nervous and frightened. It was held that uninhabitability was not required for a constitutional taking, it being sufficient that the utility of the land had been limited and its value diminished. Repeated decisions have upheld and applied the test of substantial interference.[10]

II. There Are No New or Important Questions of Federal Law

Petitioner's first question therefore comes tumbling down upon its own incorrect factual hypotheses. *A fortiori* there is no important federal question warranting review by this Court. Petitioner's acceptance of the "full implications" of the *Griggs* decision (Petition, p. 16) is in effect an admission of this fact. Even if, *arguendo,* as to some particulars the facts of this case were to be considered as extending to some degree the

[10] *Highland Park, Inc. v. United States,* 161 F.Supp. 597 (Ct.Cl. 1958); *Adaman Mutual Water Co. v. United States,* 181 F.Supp. 658 (Ct.Cl. 1958); *Matson v. United States,* 171 F.Supp. 283 (Ct.Cl. 1959); *Hopkins v. United States,* 173 F.Supp. 245 (N.D. Tex. 1959); *Wright v. United States,* 279 F.(2d) 517 (Ct. Cl. 1960); *Jensen v. United States,* 305 F.(2d) 444 (Ct. Cl. 1962); *Bacon v. United States,* 295 F.(2d) 936 (Ct.Cl. 1961); *Davis v. United States,* 179-59 (Ct.Cl. Dec. 2/14/64).

facts of *Causby* and *Griggs*, petitioner has totally failed to demonstrate how such facts, if found by a state court to constitute a constitutional taking or damaging, conflict with the intent of Congress in enacting the Federal Aviation Act of 1958. Petitioner itself refutes its "intent" thesis by admitting that "Congress undoubtedly foresaw (and in fact subsequently made provision for) the necessity of compensating private property owners where the establishment of an aerial approachway would entail the appropriation of airspace essential to the use and enjoyment of subjacent land" (Petition, p. 18).

Petitioner contends that the decision below denies "any force or effect whatsoever" to the federally created right of "freedom of transit" (Petition, pp. 13-14)). It is in error. The court below stated:

> "The Congress has placed certain airspace in the public domain. Consequently, aircraft are permitted to use such airspace subject only to federal regulation of their routes and operating procedure. . . . *It does not follow from the inability of the landowner to enjoin the use of navigable airspace, semantic difficulties aside, that he should be unable also to recover for a decline in the market value of his land which was brought about or inflicted for the public benefit.*" (Petition, App. A, pp. 8-9.)[11] (Italics added)

[11]Earlier in *Mills v. Orcas Power & Light Co.*, 56 Wn.(2d) 807, 355 P.(2d) 781 (1960), the Washington Court considered the effect of the Federal Aviation Act of 1958 as follows:

"However, Congress cannot, nor has it purported to, completely immunize from liability operators of such aircraft or those responsible for the flight paths . . . An airplane flying within such limits is not a trespasser with respect to the property below, but is privileged to travel this modern highway. . . . The burden of *United States v. Causby, supra*, and *Ackerman v. Port of Seattle, supra*, is that a land-

The Washington Supreme Court gives full effect to the right of freedom of transit, and in no wise affects or obstructs federal regulation of air commerce. Its conclusion that the Federal Aviation Act of 1958 did not purport to abrogate remedies afforded private landowners by state law is supported by Congress' declaration therein that:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 72 Stat. 798, 49 U.S.C. 1506 (Supp. 1962).

Petitioner's second question is a variation upon its first and subject to the same defects. Since petitioner concedes that "a reasonable application of the eminent domain provisions of the Washington Constitution would [not] present any conflict with the federal requirements of air commerce" (Petition, p. 19), there is no important federal question raised by the petition. Essentially, petitioner's argument comes down to the position that either the facts do not support a finding of a constitutional taking, or that the application of the eminent domain provisions by the Washington Court to the facts of this case is unreasonable. In either event, the question is solely a factual one. Petitioner may characterize noise which is so great that "it is painful to the ears of some of the residents, especially children" (Tr. 0035) as "mere noise," but its attack is still on the facts. The law is clear: The taking of property for public use without just compensation cannot

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owner has a right of action for compensation against the appropriate body or agency, but that does not purport to affect the status of flying aircraft." (56 Wn.(2d) at 820-822).

be justified under the commerce clause. The reason is apparent. As stated in *United States v. Chicago M. St. P. & P. RR. Co.*, 282 U.S. 311, 327 (1930):

> "The power to regulate commerce is not absolute, but is subject to the limitations and guaranties of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law." (Citations omitted)

III. The Questions Presented Are Not of Importance and There Is No Conflict with Federal Law

Petitioner complains that since the *Griggs* decision, *supra*, major airports "have been besieged by noise damage claims" (Petition, p. 2)[12] The complaint is documented only by a reference to testimony outside this record[13] and its own potential liability. It is significant that the Federal government has regularly followed a program of acquiring by purchase or condemnation air easements adjacent to military airfields. See, *e.g.*, *United States v. 15,909 Acres*, 176 F.Supp. 447 (S.D. Cal. 1958). Property owners have prevailed against the

[12]Petitioner's alarm is inconsistent with its protestations in the petition accepting the "full implications" (p. 16) of the *Griggs* decision, which it asserts "established a just, practical and uniform standard" (p. 19) for determining noise damage claims.

[13]Petitioner quotes General Kuhfeld's testimony before a House Subcommittee in 1962 (Petition, p. 12). The General's estimate is based upon the taking of an abrogation easement at all military airfields to a distance of six miles. The litigated area in this case is only 5,318 feet. There is no indication in the hearings as to how many military airfields there are, or the number of runways involved. Such testimony does not reveal how much of that estimate the federal government has already expended in acquiring air easements adjacent to military bases.

federal government due to such noise affecting the right to use and enjoy land. *Jensen v. United States,* 305 F.(2d) 444 (Ct. Cl. 1962); *Davis v. United States,* 295 F.(2d) 931 (Ct. Ci. 1961); *Bacon v. United States,* 295 F.(2d) 936 (Ct. Cl. 1961). In addition, a federal agency, the Federal Aviation Agency, which was surely cognizant of the implications of its recommendation, has, in its Aircraft Noise Abatement Planning Series, Item 3, September 7, 1960" (Ex. 69, St. 216-217) recommended exclusion of residential development in an area at the ends of runways which is twice as wide as the litigated area in the instant case. (See Appendix.) The Federal government also gives financial assistance to municipal or private airport owners in acquiring air easements. As this court noted in *Griggs, supra,* Congress has provided in 49 U.S.C. Sec. 1112(a)(2) for payments to the owners of airports for the "costs of acquiring land or interests therein or easements through or other interests in air space."

The other dollar figure mentioned by petitioner relates to the damage claims in this case, which petitioner asserts will approximate one million dollars. Petitioner's figure is a rather modest price tag for acquiring property constitutionally required in the development of one of this nation's major airports, and in light of the fact that in 1960 alone petitioner spent $1,960,000.00 to expand and improve this airport and in this same year started construction of an $8,000,000.00 extension to the south concourse (Tr. 00 30-31).

Petitioner's real aim in seeking review is clear:

> "At some point beyond and above the end of an airport runway, the public's right to freedom of air

> navigation is paramount to the individual's right to quietude. The definition of that point cannot be left to the variant view of 50 state courts. Consonant with the intent of Congress, only this Court can fashion a uniform standard for the nation. The quicker an authoritative answer can be given to this portentious problem, the better for all concerned." (Petition, pp. 12-13)

This is but a naked plea for an advisory opinion from this Court. Petitioner further asserts, in arguing the importance of the petition, that it challenges the "Washington Supreme Court's decision that an airport operator must pay everyone within earshot of an airport who claims that his property has been reduced in value" (Petition, p. 12). This too is a bald invitation for the Court to go beyond the record in this case. It totally ignores the fact that respondents' homes are situated within a strictly delimited area. Petitioner fails to substantiate the alleged need for uniformity; it cites no "variant" views of state courts, nor any conflict between state and federal decisions.

IV. The Decision Below Is Clearly Correct

This case was tried in the mold of *United States v. Causby,* 328 U.S. 256 (1946); *Griggs v. County of Allegheny,* 369 U.S. 84 (1962) and *Ackerman v. Port of Seattle,* 55 Wn.(2d) 400, 348 P.(2d) 664 (1960).

In *Causby* it was held that flights of aircraft so low and so frequent as to "subtract from the owner's full enjoyment of the property and to limit his exploitation of it" (328 U.S. at 265) amount to a taking of the property "so long as the damage is substantial" (328 U.S. at 266).

Griggs neither limited nor expanded the test for a taking set forth in *Causby* but rather relied upon it. *Griggs* did, however, settle that the municipal airport owner is liable for the taking and that notwithstanding Congress' redefinition in 1958 of "navigable airspace" to include "airspace needed to insure safety in take-off and landing of aircraft" (72 Stat. 739, 49 U.S.C. 1301 (24) (Supp. 1962), the owners of private property retain such interest in the airspace as is necessary to their full use and enjoyment of the property.

The facts of this case fall squarely within the principles enumerated in cases discussed above. The findings of the state court have clearly established that flights of jet aircraft are so low and frequent as to cause substantial interference with the use and enjoyment of respondents' lands and a substantial diminution in their property value. *Griggs* settled that flights under 500 feet, such as in this case, although within the public domain, do subject the airport owner to damage claims. The Washington Court has found that petitioner has not, as measured by constitutional standards, acquired adequate approach ways. The decision below correctly held that respondents may recover.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

RICHARD H. RIDDELL
Counsel for Respondents
PAUL R. CRESSMAN
STEPHEN E. DEFOREST
WILLIAM L. HINTZE
Of Counsel